IN THE SUPREME COURT OF FLORIDA

CASE NO. 92,006

JOE ELTON NIXON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
LEON COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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CITATIONS TO THE RECORD

References to the record will be as follows:

"R." refers to the twelve volumes of transcript, pleadings and orders, numbered pages 1-2104.

"SR1." refers to the supplemental volume containing, inter alia, a transcript of the November 25, 1987 Circuit Court hearing and orders related thereto, numbered pages 1-33.

"SR2." refers to the supplemental volume containing, inter alia, a transcript of the December 19, 1988 Circuit Court hearing and orders related thereto, numbered pages 1-64.

"SR3." refers to the supplemental volume containing, inter alia, a transcript of the August 30, 1989 Circuit Court hearing and orders related thereto, numbered pages 1-165.

"3.850R." refers to the 23-volume record on this appeal, numbered pages 1-4393.

"A-" refers to the Appendix submitted with this brief. Appendix page numbers appear in the upper right hand corner of each page. In accord with Fla.R.App.P. 9.200(a)(1), Appellant relies upon all original documents, exhibits and transcripts of proceedings filed in the lower tribunal, including depositions and other discovery, and hereby designates such depositions and other discovery as part of the record.

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STATUTES AND RULES

I. INTRODUCTION

The State has submitted its Answer Brief ("SAB") in this appeal from the circuit court's summary denial of Rule 3.850 relief without a hearing. We address here only those issues raised by the State which we feel require rebuttal.

II. DISCUSSION

POINT I

Nixon is Entitled to a Hearing on His Claim of Ineffective Assistance of Counsel Under United States v. Cronic.

The State assails Nixon's claim under United States v. Cronic, 466 U.S. 648 (1984), on two untenable grounds. First, it argues that this Court did not mean what it said when it directed Nixon to develop the claim in a Rule 3.850 Motion. Second, it proposes an unwarranted exception to the Cronic standard for instances in which the State says that its case was "overwhelming."

This Court grappled with the Cronic issue through two remands to the court below on direct appeal. After unproductive hearings in those remands, the Court concluded that the core issue in the Cronic claim -- whether this defendant consented to his lawyer's concession of guilt -- could only be determined in a Rule 3.850 proceeding in which evidence would be adduced without the constraint of the attorney-client privilege. In

directing that course, this Court expressly noted the incomplete hearing record on the remands. Nixon v. State, 572 So.2d 1336, 1340 (Fla. 1990), cert. denied, 502 U.S. 854 (1991). The State's suggestion that the issue can now be resolved without a hearing is thus contrary to this Court's considered conclusions, not to mention the State's own position on direct appeal:

> [T]he state urges this Court to...refuse to engage in speculation as to what occurred off-the-record below and require appellant to "ripen" his claim by alleging nonconsent to his defense counsel's strategy pursuant to a motion for post-conviction relief whereupon an on-the-record inquiry could then be conducted.

State's Answer Brief on Direct Appeal at 19; 3.850R. 2891.

The State has tried to frame the issue in the context of defense counsel's state of mind; i.e., did Michael Corin have reasonable grounds to believe that Joe Nixon was guilty of capital murder? Did he act in good faith in conceding guilt? See, e.g., SAB at 35-36. The State neglects the crucial questions: Did Joe Nixon know that Michael Corin would concede guilt and did Joe Nixon agree to that course? Those questions have not yet been answered, because no hearing has been had at which they might be asked.

The State misunderstands a fundamental tenet of our adversary system of criminal justice: No lawyer, acting in the best of faith or otherwise, can concede his client's guilt without that client's consent. Such a concession, being the

functional equivalent of a guilty plea, must be accompanied by the unequivocal consent of the accused. See Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). See also, ABA Standards for Criminal Justice 4-5.2(a)(I)(the accused has the ultimate authority to make certain fundamental decisions regarding the case, including whether to plead guilty).

In another attempt to whittle away at Cronic, the State urges that many decisions cited by Nixon are inapplicable simply because they are not capital prosecutions. See SAB at 32, n.3. Of course, courts have uniformly recognized that "death is different,"[1] but this is an odd point for the State to make. If anything, it suggests that the Cronic standard should be maintained at its current level in capital cases, not diluted.

Next, the State urges that in any event the Cronic claim can be resolved without a hearing because the State's case against Nixon was "overwhelming." See SAB at 34-35. The State relies on excerpts from People v. Johnson, 538 N.E.2d 1118 (Ill. 1989), to urge this Court to read Cronic narrowly and exclude Nixon's

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[1] Monge v. California, 118 S.Ct. 2246, 2252 (1998) ("Because the death penalty is unique 'in both its severity and its finality' [citing Gardner v. Florida, 430 U.S. 349, 357 (1977)], we have recognized an acute need for reliability in capital sentencing proceedings."); California v. Ramos, 463 U.S. 992, 998-999 ("the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination."); Tillman v. State, 591 So.2d 167, 169 (Fla. 1991)("...death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny...").

claim from its ambit. See SAB at 33-34. In Johnson, the Illinois Supreme Court distinguished its decision in People v. Hattery, 488 N.E.2d 513 (Ill. 1985), cert. denied, 478 U.S. 1013 (1986), but not so much so as to remove Nixon's Cronic claim from the influence of Hattery, in which defense counsel conceded capital murder, with "no theory of defense" other than to prove, by way of mitigation, that the defendant had been compelled to participate in the murders. See 488 N.E.2d at 516. In contrast, Johnson's counsel conceded the killing but strenuously argued against capital murder, based on the lack of the required accompanying felony under Illinois law. He put on a case to that effect at the guilt phase and continued that strategy into the penalty phase. In Johnson, the defense strategy was fully-formed: to admit non-capital murder and disprove capital murder at both phases of trial. Nixon's counsel admitted the capital murder and then, as we have already shown (see Initial Brief of Appellant ("AB") at 68-71), admitted some of the aggravating circumstances as well. There was no meaningful defense, and thus Johnson has no applicability to this appeal.

Putting aside whether the State's proposed exception for "overwhelming" cases even exists, our statement of the facts (AB at 4-28) shows that this case would not qualify for such an exception. For example, the State does not explain how Nixon could have singlehandedly kidnapped Jeanne Bickner and driven

her to the crime scene in the MG, which car -- the MG or the Monte Carlo -- was actually used in the crime, or why the police initially suspected Joe Nixon's brother, John. Whatever Nixon's involvement in the crime, his lawyer could have contested the charge of capital murder based on these weaknesses and discrepancies in the State's case, and others detailed in Appellant's Initial Brief, at 6-18.

Although the State cites some other cases that suggest a sparing application of Cronic (see SAB at 33-35), those too are distinguishable[2] and certainly do not support the State's proposition that, in a capital trial, defense counsel may concede both guilt and aggravating circumstances without a clear showing of his client's assent to such a course of action.

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[2] In LoBosco v. Thomas, 928 F.2d 1054, 1056-58 (11th Cir. 1991), defense counsel "spoke extensively with LoBosco and his father prior to initiating the strategy of convincing the jury that LoBosco was being cooperative with the state's case." The defendant and his father had understood and agreed to the strategy. Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987), supports Nixon's claims (see discussion in text at 13-14). United States v. Sanchez, 790 F.2d 245, 253-254 (2d Cir.), cert. denied, 479 U.S. 989 (1986), is an atypical, non-capital case in which the defendant was tried in absentia. Defense counsel did not concede guilt, but merely remained silent at trial. His client, who had jumped bail, never appeared, and the lawyer never discussed strategy with the client. Nixon, of course, was available to Mr. Corin. The State's reliance on Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997), is puzzling. The Fifth Circuit acknowledged that "constructive denial [of effective assistance] will be found when counsel fails 'to subject the prosecution's case to meaningful adversarial testing...'" 103 F.3d at 1228, citing Cronic, 466 U.S. at 659.

POINT II

The Claims of Incompetency to Stand Trial Under Pate and Drope are Properly Before This Court and Should Be Resolved in Nixon's Favor, Either on the Record or After an Evidentiary Hearing

A. Procedural Bar

This Court has repeatedly heard competency claims in post-conviction cases (see cases cited in AB at 30 n.12), but the State chooses to rely on the few times the Court has declined to do so (see cases cited in SAB at 56). The cases can be easily reconciled, because when this Court has found a procedural bar, the competency issue had been addressed on direct appeal or in other earlier proceedings, and thus assertion of the claim amounted to re-litigation of an already exhausted claim.[3]

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[3] In Lopez v. Singletary, 634 So.2d 1054 (Fla. 1993), the defendant had raised the competency issue on direct appeal, and this Court concluded, "Thus, this claim is procedurally barred now, the substance of it having been found meritless on direct appeal." Id. at 1057. The same occurred in Medina v. State, 573 So.2d 293, 295 (Fla. 1990)("post-conviction proceedings cannot serve as a second appeal."), and in Adams v. State, 456 So.2d 888, 890 (Fla. 1984) (competency appears to have been raised on direct appeal). In Bundy v. State, 538 So.2d 445, 446-47 (Fla. 1989), the issue had been addressed in earlier post-conviction proceedings; and in Johnston v. Dugger, 583 So.2d 657, 660, there was an evidentiary hearing on competency. In Nixon's case, the competency issue has never been aired, so the policy considerations against multiple determinations of the same issue do not come into play. In Johnson v. State, 593 So.2d 206 (Fla. 1992), cert. denied, 506 U.S. 839 (1992), the prisoner claimed, apparently under the Eighth Amendment and Ake v. Oklahoma, 470 U.S. 68 (1985), that he "was denied his right to the independent and competent assistance of a mental health expert." Johnson, 593 So.2d at 208. There is no indication that Johnson asserted a due process claim like Nixon's under Pate v. Robinson, 383 U.S. 375 (1966), or Drope v. Missouri, 420 U.S. 162 (1975).

Reliance on any of the State's cases as authority for dismissal of a competency claim not adjudicated on direct appeal cannot be squared with the numerous cases in which this Court has ordered competency claims to be heard on 3.850 motions when competency was not raised on direct appeal. See cases cited in AB at 30 n.12.

If the competency claim has not been raised on direct appeal, it is properly asserted in Rule 3.850 proceedings under basic principles of both state and federal law. Claims founded on Pate and Drope derive from the due process clauses of the Fifth and Fourteenth Amendments. See Cooper v. Oklahoma, 517 U.S. 348, 354 (1997); Pate, 383 U.S. at 378, citing Bishop v. United States, 350 U.S. 961 (1956); Drope, 420 U.S. at 183. In Florida, these claims of fundamental error may be raised at any time. See Hipp v. State, 650 So.2d 91, 92 (Fla. 4th DCA 1995) ("Notwithstanding the language of Rule 3.850, an error which amounts to a denial of due process can be raised for the first time in a post-conviction proceeding.") and the cases cited therein. See also, Willie v. State, 600 So.2d 479, 482 (Fla. 1st DCA 1992); Vause v. State, 502 So.2d 511, 512 (Fla. 1st DCA (1987); Stephens v, State, 478 So.2d 419 (Fla. 3d DCA 1985). Cf. Cooper, 517 U.S. at 354 n.4; Drope, 420 U.S. at 174 ("[W]e

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Finally, Rosier v. Florida, 655 So.2d 160 (Fla. 1st DCA 1995), involved convictions for grand theft and burglary, not capital murder; significantly less was at stake there than here.

note that while proceedings under the Rule [of the Missouri Supreme Court regarding post-conviction proceedings] 'ordinarily cannot be used as a substitute for direct appeal involving mere trial errors or as a substitute for a second appeal,' nevertheless 'trial errors affecting constitutional rights may be raised [in post-conviction proceedings] even though the error could have been raised on appeal.' Mo.Sup.Ct. Rule 27.26(b)(3).").[4]

Claims of lack of competency to stand trial thus should not be procedurally barred when, as here, manifest record evidence and post-conviction evidentiary proffers support them. Such a rule embodies sound policy. It is hard to justify denying procedural safeguards to a putatively incompetent defendant who, by definition, could hardly determine how to preserve that claim at trial or on direct appeal. Cf. Pate, 383 U.S. at 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently waive his right to have a court determine his capacity to stand trial."). Accord, Drope,

[4] The State relies upon a single sentence in James v. Singletary, 957 F.2d 1562, 1572 (11th Cir. 1992) ("...Pate claims can and must be raised on direct appeal."). SAB at 58. That reliance is misplaced. First, the pronouncement in James is a federal court's statement, with no supporting argument or authority, of Florida law -- a statement not binding on this Court. Second, the pronouncement is pure dictum, as the Pate claim was not contained in James' habeas petition. See 957 F.2d at 1572. Third, the language in James is not a correct statement of Florida law; as the authorities in the text above demonstrate, fundamental due process claims may be asserted in Rule 3.850 proceedings, even if they were not raised on direct appeal.

420 U.S. at 176-77; Zapata v. Estelle, 588 F.2d 1017, 1021 (5th Cir. 1979).[5]

B. The Competency Claims on the Merits

Under Pate, whenever circumstances raise a bona fide doubt as to competency the trial judge has an obligation under the United States Constitution to conduct an appropriate inquiry. Florida has codified this duty (see Fla.R.Crim.P 3.210), but in this case, the trial judge did not discharge it, even though Nixon spent virtually all of the trial hiding in his cell, barely dressed, asking for a black lawyer and a black judge, and otherwise behaving in a bizarre and irrational manner. Faced with such a defendant, the trial judge did nothing more than interview him in his cell for a few minutes, which fell far short of the procedures required under the Florida rules and Pate. See AB at 62-63; Fla.R.Crim.P. 3.210(b). The State suggests that the trial judge was excused from a more detailed inquiry, either because of a cursory screening by Dr. Stimel in the prior assault case (SAB at 63), or because of Dr. Ekwall's statement, made months before trial, that Nixon was not

[5] If this Court elects to adopt a rule barring post-conviction claims of incompetency to stand trial, it should do so only prospectively. Joe Nixon should not be made to suffer the loss of this substantive claim as the result of the application of a purported rule of procedural default that, heretofore, has not been regularly applied.

incompetent (SAB at 60-61). Both suggestions are wrong. "[A] prior determination of competency does not control when new evidence suggests the defendant is at the current time incompetent." Nowitzke v. State, 572 So.2d 1346, 1349 (Fla. 1990). Cf. Tingle v. State, 536 So.2d 202, 203 (Fla. 1988) ("The trial judge's independent investigation was not sufficient to ensure that Tingle was not deprived of his due process right of not being tried while mentally incompetent.")

Because the facts here mirror those in Pate, the result here is controlled by Pate. Given the substantial time between the trial and these post-conviction proceedings, the appropriate remedy is a new trial with a competency determination in accordance with the rules, since a retroactive competency determination would be insufficient on this record. See Hill v. State, 473 So.2d 1253 (Fla. 1985); Pate, 383 U.S. at 377; Drope, 420 U.S. at 183.[6]

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[6] In Drope, the Supreme Court held:

> The question remains whether Petitioner's due process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, we cannot conclude that such a procedure would be adequate here. The State is free to retry petitioner, assuming, of course, that at the time of such trial he is competent to be tried.

Drope, 420 U.S. at 183 (citations omitted). Cases in which this Court has reached the merits of competency claims have not

Furthermore, Joe Nixon had a right under the United States Constitution and Florida law not to be tried while incompetent. See Drope; Nowitzke v. State, 572 So.2d at 1349; Tingle v. State, 536 So.2d at 203. As to that claim, even the State concedes Nixon's entitlement to an evidentiary hearing to determine competency if he has raised a substantial and legitimate doubt about the issue. See SAB at 58-60. We part company with the State, however, on the necessity for and scope of that hearing. For the reasons already stated, Nixon has raised substantial and legitimate concerns sufficient to warrant a hearing. And at that hearing, the court must consider all available evidence.

Citing James v. Singletary, the State suggests otherwise: that the post-conviction court should ignore trial record evidence of incompetency in a nunc pro tunc hearing. SAB at 57-58. This defies law, common sense and experience. If a retrospective competency determination is to be made despite the problematic nature of such determinations (see note 6 supra), the trial court cannot keep one eye closed; it must consider all

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always resulted in the same type of hearing or adjudication. Compare, for example, Hill v. State, 473 So.2d 1253, 1259 (Fla. 1985) (nunc pro tunc determinations of incompetency not favored; new trial the appropriate remedy), with Mason v. State, 489 So.2d 734 (Fla. 1986) (remanded for nunc pro tunc determination of competency). However, this Court has recognized, as have others, that retrospective determinations of competency are highly problematic. See Hill, 473 So.2d at 1259; Drope, 420 U.S. at 183; Pate, 383 U.S. at 377.

available probative evidence -- evidence in the trial record and evidence subsequently adduced; the hearing cannot proceed in a vacuum devoid of contemporaneous trial evidence. See Reynolds v. Norris, 86 F.3d 796, 803 (8th Cir. 1996) ("When determining whether a meaningful hearing may be held, we look to the existence of contemporaneous medical evidence, the recollections of non-experts who had the opportunity to interact with the defendant during the relevant period, statements by the defendant in the trial transcript, and the existence of medical records."); Bruce v. Estelle, 536 F.2d 1051, 1057, 1058 (5th Cir. 1976) (court relied on the trial transcript), cert. denied, 429 U.S. 1053 (1977); Fallada v. Dugger, 819 F.2d 1564, 1568, 1569 (11th Cir. 1987) ("A Pate analysis must focus on what the trial court did.").

The court below erred in dismissing, out-of-hand, Nixon's claims of incompetency to stand trial. If the court could not resolve those claims in Nixon's favor by reference to the trial record, which we submit it could and should have done (and which this Court should now do), it must hold an evidentiary hearing to determine Nixon's competency claims. For even if this Court were to hold that the record alone does not support a finding of incompetency under Pate, it does not follow that the record shows that Nixon was actually competent under Drope. Such a finding can only occur after an evidentiary hearing at which the

defense may present evidence of incompetency, and the penalty phase trial expert evaluations, upon which the State now relies (see SAB at 44-46), can be tested in light of the trial record and the post-conviction record, including the mental health evaluations proffered in the Rule 3.850 proceeding. See Fallada v. Dugger, 819 F.2d at 1568 n.1 (citing Adams v. Wainwright, 764 F.2d 1356, 1360 (11th Cir. 1985), cert. denied, 474 U.S. 1073 (1986)).

POINT III

Nixon Is Entitled to a Hearing to Demonstrate The Validity of His Claims of Ineffective Assistance Under Strickland v. Washington

A. Ineffective Assistance at the Guilt Phase

1. Guilt Phase Issues In General

We will not engage here in a battle pitting the State's view of the facts against ours. Fundamentally, we disagree not only on the facts, but also on the effect that the concession of guilt and defense counsel's failure to contest even a single issue at the guilt phase had on the outcome of this capital trial.

We did not set forth the many discrepancies between the State's case and the evidence -- both available at the time of trial and adduced afterwards -- for the purpose of demonstrating beyond a reasonable doubt that Joe Nixon was innocent. Nixon

need not satisfy such a burden to obtain the relief he now seeks. We set forth the discrepancies to show that defense counsel's concession of guilt and failure to test the State's case prejudiced Nixon by making it impossible for the jury to reach any verdict other than that Joe Nixon was guilty of capital murder, although such a verdict was far from incontestable.

Defense counsel's concession at the guilt phase took on added significance because it left the State's case -- including proof of aggravating circumstances -- wholly unquestioned, and thus tilted the scales toward death in the penalty phase. Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987), cited by the State, explains how a guilt concession can result in an impermissible death sentence:

> Pierce [defense counsel] conceded in his opening argument that Magill had killed Ms. Young. Thus, it was apparent early in the guilt phase that the jury's choice even at that stage was between a conviction for capital murder and a conviction for a lesser degree of murder entailing life imprisonment. The distinction between the two phases of this trial was blurred further by the fact that Pierce spent much of his time during the guilt phase arguing that Magill's life should be spared. Under these circumstances, it is likely that events during the guilt phase had an unusually strong impact on the outcome of the penalty phase.

824 F.2d at 888-889. In Magill, the Eleventh Circuit granted relief and ordered a new sentencing proceeding. Id. at 896. This Court should at least do likewise. The concession here was

neither harmless nor non-prejudicial. It left the jury with little to do but convict Joe Nixon of murder and then sentence him to die.

2. Failure to Suppress the Confession

In asserting that defense counsel was not ineffective in failing to move to suppress Nixon's confession, the State confuses two issues: first, whether counsel acted reasonably in not challenging the confession; second, whether the trial judge would have acted reasonably in rejecting such a challenge.

The starting point of Sixth Amendment analysis is that defense counsel is supposed to act as advocate for the defendant, pursuing claims that have a reasonable chance of prevailing and of improving the defendant's case, not disregarding claims whenever there is also a chance they may not prevail. The effectiveness of Nixon's trial representation depends upon whether his lawyer made a reasonable professional judgment to forgo challenging his confession in light of the information he had about Nixon's impaired capacity to understand and waive his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and resist police interrogation. This issue cannot be resolved by looking at the record made in the absence of any defense presentation of evidence aimed at suppressing the

confession and then announcing -- unsurprisingly -- that the confession appears admissible on that record.

Regardless of the varying IQ numbers,[7] defense counsel had good reason to believe that Nixon's intelligence was marginal and his emotional state precarious. His own experts characterized Nixon as "borderline" (see A-352), and Nixon was so unstable in the days leading up to the crime that he had tried to get himself arrested beforehand (see R. 776-86), suggesting that he was susceptible to confessing to just about anything. Defense counsel had represented Nixon in the previous case in which his competency came into question. See AB at 23. He knew of these factors and tried to use them in mitigation at the penalty phase. He should have used them from the outset to suppress the confession.

And the confession could have been suppressed. Confessions have been questioned on the basis of the kinds of factual information that Nixon's lawyer had but failed to follow up and present. See, e.g., Cooper v. Griffin, 455 F.2d 1142, 1145 (5th Cir. 1972) (mental retardation can render a defendant incapable of intelligently waiving his Miranda rights); Moore v. Ballon, 658 F.2d 218, 229 (4th Cir. 1981) (youthfulness and schizophrenia can combine to invalidate the waiver); Miller v.

[7] The State's references to differing IQ scores in Nixon's institutional history (see, e.g., SAB at 21, 23 and 24) underscore the need for an evidentiary hearing to resolve this crucial issue.

Dugger, 838 F.2d 1530, 1539 (11th Cir.)("[M]ental illness is certainly a factor that a trial court should consider when deciding on the validity of a waiver. If a defendant cannot understand the nature of his rights, he cannot waive them intelligently."), cert. denied, 486 U.S. 1061 (1988).

B. Ineffective Assistance at the Penalty Phase

Although the State largely concedes the need for a hearing as to whether Nixon's trial counsel unreasonably failed to present mitigation evidence (SAB at 69), it asserts that the court below correctly denied Nixon's claim of penalty phase ineffective assistance without a hearing because, according to the State, Nixon cannot show prejudice (SAB at 70-73). The State thus tries an end run around the well-settled requirement of an evidentiary hearing in cases like this one, where the defendant raises legitimate issues about the adequacy of penalty phase representation.

To determine whether Nixon's lawyer conducted a reasonable investigation, the trial court must first decide whether an investigation would likely have uncovered the material now claimed to have been overlooked. Then, it must decide whether the failure to put the evidence before the jury was a reasonable tactical choice. Middleton v. Dugger, 849 F.2d 491 (11th Cir.

1988). The State all but concedes the need for a hearing on this score:

> Because there has been no evidentiary hearing in this case, it is not clear from this record whether, in fact, Attorney Corin knew of the matters alleged in the motion pertaining to the abuse and deprivation suffered by Appellant.

SAB at 69.

An evidentiary hearing will answer crucial questions: whether counsel knew of the abuse and deprivation; if so, whether he had a reasonable basis for not presenting this information; whether he provided the information to his experts and how they considered it;[8] whether he understood the meaning of his experts' interpretation of Nixon's psychological profile and whether he discussed how best to use that information at trial; why he stated that there was "some organic problem in the family" (R. 1032) yet did little with the information;[9]

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[8] The opinions of the post-conviction mental health experts who evaluated Nixon controvert those of the trial witnesses, Drs. Ekwall and Doerman. Only an evidentiary hearing can determine the impact of long-term physical, emotional and sexual abuse and the other factors brought to the attention of the post-conviction experts but unknown to the doctors who participated in the trial. The abuse is not "remote," as contended by the State (SAB at 71). Dr. Henry Dee stated, "Some of the most vital facts were unknown by the prior examiners, among them: Mrs. Nixon's alcohol ingestion during pregnancy, the high level of brutality, neglect, and hunger experienced in the Nixon home, the long-term rape and sexual abuse suffered by Joe Nixon." (Dee Report at 8, 3.850 R. 726; A-140).

[9] Counsel's statement suggests that he knew of serious problems in the Nixon family background; it refutes the State's speculation (SAB at 69) that he had "no reason to suspect such [abuse and deprivation] existed." His own exhibits put him on

whether he discussed with the experts the need to investigate the organic problems and whether he had a reason not to pursue such investigation; and whether he simply did not have time to deal with these issues.[10] Speculation by the State will not do; the proffered mitigation evidence here is substantial and was available to counsel at trial. Only after key questions are answered can a court decide whether counsel conducted an adequate investigation and made reasonable tactical choices. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland v. Washington, 466 U.S. 668, 690-91 (1984).

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notice. Exhibit 12: a statement of Nixon's parents, indicates that their discipline of him consisted of "whipping and talking to." Exhibit 13: "...family can't visit, but they haven't even written to him." Exhibit 14: father "did not know how to handle his children except by whipping them;" the two oldest children, both girls, have run away from home, and the parents "communicate very poorly with their children and have little knowledge or skills in the difficult art of parenting." Exhibit 19: an "unconcerned and misunderstanding father." Exhibit 23: "Three other Nixon children are known to DYS. A contributing factor to the children's problems was reported by the DYS worker to be the parent's lack of understanding the importance of providing adequate supervision, and basic principals [sic] of parenting."

[10] Counsel said that his preparation time for the trial was "probably shockingly little" (SR. 48), that the case was a "very heavy burden," and that "[t]here are a lot of strategic decisions here that are going to have to be made, and I don't want to have to make them in a three day period of time." (R. 927).

The State's attempt to avoid a hearing by arguing lack of prejudice -- that nothing counsel could have done would have saved his client -- begs crucial questions: What information would counsel have adduced and how would that have affected the outcome? The State lists distinguishable cases in which defendants lost their penalty phase claims of ineffective assistance (most after evidentiary hearings) (SAB at 72),[11] and

[11] None of the State's cases show circumstances like those alleged here. Grossman v. Dugger, 708 So.2d 249 (Fla. 1997) (evidentiary hearing; counsel's testimony revealed a reasonable basis for not calling certain witnesses); Breedlove v. State, 692 So.2d 874, 876-77 (Fla. 1997) (evidentiary hearing; family background witnesses would have divulged harmful material and opinions of original mental health experts were unchanged by new evidence); King v. State, 597 So.2d 780, 782 (Fla. 1992) (evidentiary hearing; risks justified counsel's decision not to present proffered evidence); Mendyk v. State, 592 So.2d 1076, 1080 (Fla. 1992) (summary determination; no showing of childhood physical or sexual abuse.); Puiatti v. Dugger, 589 So.2d 231 (Fla. 1991) (summary determination; at trial defendant argued he had a good family background, in post-conviction he tried to show the opposite; most of the proffered evidence had been presented to the jury.); Buenoano v. Dugger, 559 So.2d 1116, 1119 (Fla. 1990) (summary determination in state court, but federal court held evidentiary hearing finding internal conflicts and untruths in petitioner's background evidence. See Buenoano v. Singletary, 74 F.3d 1078, 1084 (11th Cir. 1996)); Correll v. Dugger, 558 So.2d 422, 426 (Fla. 1990) (summary determination; counsel had a "good tactical reason" not to stress newly proffered evidence of drug and alcohol abuse since defendant was maintaining his innocence and evidence of substance abuse would hurt him; defendant testified at trial that "he was close to and loved his father [but] Correl now alleges an abusive upbringing, with his deceased father as the cause of his misery."); Tompkins v. Dugger, 549 So.2d 1370, 1373 (Fla. 1989) (evidentiary hearing; the nature, extent and effects of the alleged child abuse and substance abuse are not discussed.), cert. denied, 493 U.S. 1093 (1990); Francis v. Dugger, 529 So.2d 670, 673 (Fla. 1988) (evidentiary hearing; family witnesses' testimony not only remote but inconsistent concerning childhood abuse); Clisby v. Alabama, 26 F.3rd 1054,

it disregards the cases more similar to this one in which evidentiary hearings were held. Cherry v. State, 659 So.2d 1069 (Fla. 1995); Heiney v. Dugger, 558 So.2d 398 (Fla. 1990); Hildwin v. Dugger, 654 So.2d 107 (Fla.), cert. denied, 516 U.S. 965 (1995); State v. Lara, 581 So.2d 1288 (Fla. 1991); and Rose v. State, 675 So.2d 567 (Fla. 1996).

For example, as here, in Hildwin defense counsel had presented some witnesses at the sentencing hearing, but the mitigation testimony was "quite limited," showing only "that Hildwin's mother died before he was three, that his father abandoned him on several occasions, that Hildwin had a substance abuse problem, and that Hildwin 'was a pleasant child and is a nice person.'" 654 So.2d at 110 n.7. After a post-conviction hearing, this Court ruled that "counsel's errors deprived Hildwin of a reliable penalty phase proceeding...," because the evidentiary hearing showed:

> (1) that Hildwin murdered Cox while under the influence of extreme mental or emotional disturbance, and (2) Hildwin's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Both experts also recognized a number of nonstatutory mitigators: (1) Hildwin was abused and neglected as a child; (2) Hildwin had a history of substance abuse;

1056-57 (11th Cir. 1994), cert. denied, 513 U.S. 462 (1995) (evidentiary hearing in district court; defendant's new expert "admitted to reaching 'much the same result'" as the trial expert; new expert testified that defendant "is not even mildly retarded."); Hance v. Zant, 981 F.2d 1180, 1183-84 (11th Cir. 1993) (evidentiary hearing; counsel's decision to defer to his client's wishes not to contact family was reasonable).

> (3) Hildwin showed signs of organic brain damage; and (4) Hildwin performs well in a structured environment such as a prison. In addition, Hildwin presented substantial lay testimony regarding mitigation which was not presented at sentencing.

654 So.2d at 110. Cherry, Heiney, Lara and Rose are equally dispositive of Nixon's entitlement to a hearing and, ultimately, to relief. In each case, the severity of the crime is indistinguishable from this case,[12] yet in each case this Court ordered an evidentiary hearing on the penalty phase claims.

The State suggests that trial counsel would have achieved little by "sanitizing" Joe Nixon, SAB at 79. This fails to address our argument, which arises from trial counsel's demonizing of Joe Nixon. This is not a case where a trial counsel made a few isolated improper statements; instead his comments assured a death sentence at every turn. He excoriated his client and drove home damaging evidence with argument that went far beyond any strategy of being honest with the jury.[13]

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[12] Cherry beat his female victim to death. Cherry v. State, 544 So.2d 184, 187-188 (Fla.1989), cert. denied, 494 U.S. 1090 (1990). Heiney committed a savage murder with a claw hammer. Heiney, 558 So.2d at 399. Hildwin "raped, and slowly killed his victim" by strangulation, making her "'acutely aware of [her] impending [death].'" Hildwin v. State, 531 So.2d 124, 128 (Fla.1988), affirmed, 490 U.S. 639 (1989). Lara's double murder included both a shooting victim and a victim whom he raped and bound and gagged before killing with a serrated knife. Lara v. State, 464 So.2d 1173, 1175 (Fla. 1985). Rose killed an eight-year old girl with a hammer and dumped her nude body in a canal. Rose v. State, 425 So.2d 521, 522 (Fla.), cert. denied, 461 U.S. 909 (1983).

[13] The State claims that defense counsel "said nothing to distance himself" from appellant, or to "dehumanize" him, that he never

And any mental health "strategy" was devastated by relentless, unwarranted, and unsubstantiated elicitation of his client's lack of remorse, lying nature, future dangerousness and incapacity for rehabilitation. See AB at 73-75.

Osborn v. Shillinger, 861 F.2d 612, 628 (10th Cir. 1988), is more directly on point. There counsel "made public statements to the effect that Osborn was not amenable to rehabilitation," and his arguments in the sentencing proceeding "'stressed the brutality of the crimes....Counsel described the crimes as horrendous.'" Id. (Emphasis in original.) Nixon's lawyer did the same. The State seeks to distinguish Osborn (SAB at 79, n.7) by arguing that Nixon's lawyer did not label his client an "animal" or a "shark." Instead, he called him an "ogre," (R. 674), so the State's distinction lacks a difference.[14]

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told the jury that Nixon is "worthless," or that he was only reluctantly representing him. SAB at 78. Counsel began his penalty phase closing argument, "The fact that I represent Joe Elton Nixon does not mean that I don't have normal human feelings." R. 1019. He stated that Nixon is a person who the mental health experts "pretty much concluded" was not a "worthwhile human being." R. 1025.

[14] The State also cites Davis v. Executive Director, 100 F.3rd 750 (1996), cert. denied, 117 S.Ct. 1703 (1997). SAB at 79 n.7. But Davis' attorney's statements did not stress the brutality of the crimes. Id. at 759. Moreover, the Davis court found, after an evidentiary hearing, that counsel made "an informed tactical decision not to use the evidence...because of its potential detrimental effect..." People v. Davis, 849 P.2d 857, 861 (Colo. Ct. App. Div. II 1993), aff'd, 871 P.2d 769, 774 (Colo. Sup. Ct. (en banc) 1994). The federal court concurred, 100 F.3d at 762: "[T]estimony from family members was fraught with

Finally, the State misconstrues the case law applicable to the findings of Drs. Dee, Keyes and Whyte and of the mitigation evidence. The cases the State cites (SAB at 75), Stano v. State, 520 So.2d 278 (Fla. 1988), Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990), Engle v. Dugger, 576 So.2d 696 (Fla. 1991), and Turner v. Dugger, 614 So.2d 1075 (Fla. 1992), do not apply.[15] Although merely securing an expert who differs with one who testified at trial might not, of itself, undermine confidence in trial counsel or his expert (Engle, 576 So.2d at 701), in this case the original experts did not know the history

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peril....”). Davis confirms the necessity of an evidentiary hearing to determine whether Nixon’s lawyer acted reasonably in not presenting mitigating evidence and presenting harmful evidence and argument.

[15] The State’s cases are inapposite. In both Stano, 520 So.2d at 281, and Turner, 614 So.2d at 1079, the collateral proceedings disclosed only differing expert opinion based on the same evidence of which the original experts were aware. In Provenzano, the defendant complained of counsel’s failure to provide mental health and family mitigation evidence, but such evidence had been submitted at the guilt phase of the trial in trying to prove insanity, so it would have been cumulative to repeat the evidence in the penalty phase. Moreover, Provenzano’s new expert gave the same opinion that the previous experts had given at the guilt phase of the trial. Nothing new had been overlooked. 561 So.2d at 546. In Jennings v. State, 583 So.2d 316, 321 (Fla. 1991), the court found after an evidentiary hearing that the proffered evidence was cumulative of what was presented at trial. In Johnston v. Dugger, 583 So.2d 657, 662 (Fla. 1991), where the defendant claimed that counsel should have introduced evidence of child abuse, counsel testified at an evidentiary hearing that the defendant’s family would not help him, though some testified. In Rose v. State, 617 So.2d 291, 295 (Fla. 1993), the court found, after an evidentiary hearing, that counsel did not contact family members because defendant indicated that his family would not be helpful.

that collateral counsel has gathered and which the post-conviction experts say is of vital importance to a proper evaluation. Drs. Dee, Keyes and Whyte have disagreed with the original experts based on their own findings and crucial background facts that Drs. Ekwall and Doerman could have had, but did not have. Nixon is entitled to a hearing to at which the court may consider these new opinions.

III. CONCLUSION

For all of the foregoing reasons, as well as those stated in the Initial Brief of Appellant, Appellant Joe Elton Nixon respectfully requests that this Court enter an Order in accord with the Request for Relief as stated in his Initial Brief at page 100.

Dated: October 23, 1998

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Brief of Appellant has been mailed by first class mail to the Office of Attorney General, The Capitol, Tallahassee, Fl 32399-1050, Attention: Richard Martell, Assistant Attorney General, on October __, 1998.

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Jonathan Lang, Attorney for Appellant